PP

v.

MD RASHID HARUN

HIGH COURT MALAYA, PULAU PINANG
JEFFREY TAN J
[CRIMINAL APPEAL NO: 42-30-98]
25 MARCH 1999

CRIMINAL PROCEDURE: *Sentence - Adequacy of sentence - Offence of causing grievous hurt - Acid throwing - Factors to be considered - Nature and gravity of offence - Balance between interest of the public and interest of accused - Minimum sentence to be imposed - Deterrent sentence*

This was the public prosecutor's appeal against the sentence of three years' imprisonment passed by the Sessions Court on the respondent for the offence of causing grievous hurt to his wife by splashing acid on her face.

Held:

[1] The sentence was manisfestly wrong and manifestly inadequate for it was totally unsuitable to the proved facts and circumstances of the case.

[2] The severest penalty is called for in all cases of acid-throwing. At the very least, the minimum sentence must be half the maximum penalty.

[3] In the instant case, there was a clear omission to strike a balance between the interest of the public and the interest of the respondent. There were just too much emphasis and too much weight given to the personal circumstances of the respondent, and even in the light of those so-called personal extenuating circumstances, it was certainly not in the public interest to pass less than a deterrent sentence.

[4] The sentence of three years' imprisonment showed a complete lack of understanding on the part of the trial court of the gravity of the crime. It was all so evident, that the aggravating circumstances and public interest demanded that a deterrent sentence be passed for the offence of the nature in the instant case.

[Appeal allowed.]

Case(s) referred to:
Abdul Rahman Ibrahim [1938] 7 MLJ 219 ***(refd)***
Joginder Singh v. PP [1984] 2 MLJ 133 ***(refd)***
Lee Peng Kong v. PP [1986] 2 CLJ 139 ***(refd)***
Lee Yoke Choong v. PP [1964] MLJ 138 ***(refd)***
Liow Chow v. PP [1939] MLJ 170 ***(refd)***
Low Oi Lin v. R [1949] MLJ 210 ***(refd)***
Mohamed Jusoh Abdullah & Anor v. PP [1947] MLJ 130 ***(foll)***
PP v. Fam Kim Hock [1957] MLJ 20 ***(refd)***
PP v. Jafa Daud [1981] 1 MLJ 315 ***(refd)***
PP v. Khairuddin [1982] 1 MLJ 331 ***(refd)***
PP v. Loo Choon Fatt [1976] 2 MLJ 256 ***(refd)***
PP v. Mohamed Nor & Ors [1985] 2 MLJ 200 ***(refd)***
PP v. Ng Ah Tak [1959] 25 MLJ 19 ***(refd)***
R v. Kenneth John Ball 35 Cr App R 164 ***(refd)***
R v. Murukaiyan Rasoo [1957] MLJ 26 ***(refd)***
Reg v. WN Hammar [1958] 24 MLJ 4 ***(refd)***
Rex v. Leo De Cruz [1935] 4 MLJ 1 ***(refd)***
Sinniah Pillay v. PP [1992] 1 CLJ 241 ***(refd)***
Yap Teng Chai v. PP [1959] MLJ 206 ***(refd)***
Yau Kong Kui v. PP [1989] 1 CLJ 1020 ***(refd)***

Legislation referred to:
Corrosive and Explosive Substances and Offensive Weapons Act 1958, s. 4
Penal Code, ss. 324, 326

Corrosive and Explosive Substances and Offensive Weapons Act (Cap 65) [Sing], s. 4
Penal Code [Sing], ss. 109, 326

Other source(s) referred to:
Halsbury's Laws of England, Hailsham Edn, vol 9, para 365
Mallal's Digest, 4th edn 1997, paras 2536, 2908, 2918

For the appellant - Yaacob Md Sam
For the respondent - Mohd Ismail Mohamed; M/s Ismail, Khoo & Assoc

Reported by Izzaty Izzuddin

JUDGMENT

Jeffrey Tan J:

This is the public prosecutor's appeal against the sentence of three years' imprisonment passed by the Sessions Court, Georgetown, on the respondent, on 12 February 1998, for the following offence:

> Bahawa kamu pada 24hb. Julai 1996 jam lebih kurang 10.00 pagi di rumah No. 10 Lorong Kulit, di dalam Daerah Timur Laut di dalam Negeri Pulau Pinang dengan sengaja telah menyebabkan cedera parah kepada Siti Esah Bt. Bakar KP/No. 2695726 dengan menggunakan sejenis cecair asid iaitu bahan yang boleh melecur dan berbahaya, oleh yang demikian telah melakukan kesalahan yang boleh dihukum di bawah Seksyen 326 Kanun Keseksaan.

Very briefly stated, the respondent was found to have splashed acid unto the face of his wife (victim) as she was turning her face, in response to his words to her, to face him. The photographs (see p. 131 of the appeal record) give some idea of the facial injuries sustained by the victim. However, the testimony of the doctor (SP3) who examined the victim at the casualty room says much more. "The victim, on admission, was in a critical situation" and was "then admitted to the intensive care unit". "Her left eye was injured, cornea was opaque." "There were 2nd degree burns (scalds) on face, neck and ears." "... on front of (the) chest, there were 3 or 4 linear scald area coming from the neck downwards to the mid-abdomen." "Certain areas had 3rd degree burns. The right forearm and left arm had 2nd and 3rd degree scalds". "She was given symptomatic treatment – antibiotics, oxygen, pathedine for (her intense) pain, some steroid to counter-act the reaction and hebulizer to help (her) breathing." "She was conscious throughout the treatment, but she was in a lot of pain." The victim was in hospital for about two months. "After discharge, there were some scars on the (victim's) face and upper body." "There was a permanent disfigurement of the face."

On the matter of the sentence, the trial court said:

> Hukuman maksima untuk kesalahan ini adalah penjara selama dua puluh tahun dan denda atau sebatan. Tidak boleh dinafikan bahawa kesalahan ini memang serius sebab melibatkan keganasan yang melampau (excessive violence) yang telah mengakibatkan kecederaan parah yang meninggalkan kesan-kesan seumur hidup. Saya juga telah mengambil kira bahawa perbuatan-perbuatan menggunakan keganasan, khasnya keganasan di rumah tangga, sedang berleluasa di negara kita pada masa ini. Kepentingan awam adalah faktor utama yang perlu dipertimbangkan dalam menjatuhkan hukuman dan untuk membendung kesalahan-kesalahan serius yang prevalent.

Indeed, just so as the trial court held, "in deciding the appropriate sentence ... the first and foremost consideration is the public interest" (*R v. Kenneth John Ball* 35 Cr. App. R. 164; see also *R v. Murukaiyan Rasoo* [1957] MLJ 26). "If the court finds the accused guilty or if a plea of guilty has been recorded and accepted the court shall pass sentence according to law. A 'sentence according to law' means that the sentence must not only be within the ambit of the punishable section, but it must also be assessed and passed in accordance with established judicial principles" (*PP v. Jafa bin Daud* [1981] 1 MLJ 315, 316 per Mohamed Azmi J, as he then was). "The first and foremost consideration of punishment is the public interest. (Because) the object of punishing crime is ... also to deter others" (*Yap Teng Chai v. PP* [1959] MLJ 205, 206; see also *Reg v. W.N. Hammar* [1958] 24 MLJ 4). Nonetheless, in assessing sentence all the circumstances

of the offence should be considered (*Low Oi Lin v. R* [1949] MLJ 210). "The court in fixing the punishment for any particular crime, will take into consideration the nature of the offence, the circumstances in which it was committed, the degree of deliberation shown by the offender, the provocation which he received if the crime is one of violence, the antecedents of the prisoner up to the time of the sentence, his age and character" (*Mohamed Jusoh bin Abdullah & Anor v. PP* [1947] MLJ 130, citing *Halsbury's Laws of England* (Hailsham Edition) vol 9, para 365). "Courts are duty bound to consider all these matters before deciding upon a suitable sentence" (*Joginder Singh v. PP* [1984] 2 MLJ 133 per Ajaib Singh J as he then was). The sentence must be one appropriate to the gravity of the offence (*Lee Yoke Choong v. PP* [1964] MLJ 138). Accordingly, the sentence should reflect the seriousness of the offence (*PP v. Khairuddin* [1982] 1 MLJ 331). Mitigating factors are not to be disregarded, even if the offence calls for a deterrent sentence (*Lee Peng Kong v. PP* [1986] 2 CLJ 139). That is not to say though, that "the circumstances of the individual offender are more important than the protection of innocent members of the community from injury to their persons, or from risk even to their lives" *(R v. Murukaiyan Rasoo)*. Public interest must not be relegated to the background. "The correct approach is to strike a balance, so far as possible, between the interest of the public and the interest of the accused" (*PP v. Loo Choon Fatt* [1976] 2 MLJ 256, 258 per Hashim Yeop A Sani J, as he then was; see also *PR v. Adam bin Mohamad* (*Mallal's Digest* 4th edn 1997 Revised para 2908) and *PP v. Mohd Nooh bin Yusof & Ors* (*Malall's Digest ibid* para 2918). "A court has the discretion to be lenient and merciful provided there are extenuating circumstances **and it is in the public interest to do so**" *(PP v. Khairuddin)* (emphasis added).

On an appeal on sentence, "it is an established principle that the sentence of the court of first instance should not be altered unless it is manifestly wrong, wrong in the sense of being illegal or being unsuitable to the proved facts and circumstances" (*PP v. Fam Kim Hock* [1957] MLJ 20; see also *Liow Chow v. PP* [1939] MLJ 170), manifestly excessive or inadequate (see *Abdul Rahman bin Ibrahim* [1938] 7 MLJ 219), or "unless the (subordinate court had) proceeded on wrong principles or given undue weight to some of the evidence" (*Rex v. Leo De Cruz* [1935] 4 MLJ 1), or that in fixing the sentence the subordinate court had failed to adequately consider all the relevant factors either for or against the offender (*Joginder Singh v. PP* [1984] 2 MLJ 133). "It is (also) an established principle that an appellate court should be slow to interfere with or disturb a sentence passed by the court below .... the mere fact that another court might pass a different sentence provides no reason for the appellate court to interfere if the court

below applies the correct principles in the assessment of the sentence" (*PP v. Mohamed Nor & Ors* [1985] 2 MLJ 200 per Abdul Hamid CJ (Malaya) as he then was). "An appellate court must reject the lore of nicely calculated less or more in matters of sentence" *(Liow Chow & Anor v. PP).*

In the instant case, the trial court held that the offence was "very serious" (memang serius), "sebab melibatkan keganasan yang melampau (excessive violence) yang telah mengakibatkan kecederaan parah yang meninggalkan kesan-kesan seumur hidup". On the matter of the proved facts and circumstances, the trial court said:

> fakta-fakta khusus yang terdapat dalam sesuatu kes serta faktor-faktor mitigasi ta' boleh diabaikan. Pertama tertuduh boleh dikatakan mempunyai rekod yang bersih sepanjang usia lanjutnya dan bukan seorang yang pada kebiasaannya melakukan jenayah (common criminal) walaupun terdapat satu sabitan lampau yang lebih kurang 30 tahun dahulu sebab jenis kesalahan adalah langsung tidak berkaitan dan juga tidak begitu serius. Selain dari itu, sehingga sekarang di mana umurnya telah meningkat ke 54 tahun tertuduh ta' lakukan apa-apa kesalahan jenayah. Kedua, adalah jelas bahawa perbuatan tertuduh pada hari yang malang itu berpunca dari krisis rumah-tangga yang mendesak yang dialaminya pada waktu itu akibat penglibatan mangsa dengan seorang lelaki lain dan desakannya untuk diceraikan daripada tertuduh. Walaupun keadaan ini bukan satu alasan sama sekali untuk tertuduh bertindak dengan liar tanpa berperikemanusiaan, sedikit pertimbangan perlu diberikan kepada masaalah yang membebankan tertuduh pada waktu itu. Ketiga, dalam usia tertuduh yang tua dan prospek kehilangan keluarganya pada peringkat hidup ini, saya rasa tempoh pemenjaraan yang panjang adalah tidak sesuai.

Thereupon, the trial court wrapped up the all important sentence, as follows:

> Memandangkan faktor-faktor dan sebab-sebab atas, saya berpendapat bahawa hukuman penjara untuk tempoh tiga tahun ke atas tertuduh adalah memadai untuk melindungi kepentingan awam dan berpatutan untuk semua fakta dan keadaan kes ini.

From the words of the judgment anyway, the trial court held that the offence was very serious and that the offence had brought about a permanent disfigurement (to the victim's face). The trial court inveighed that there was "excessive violence". Except, alas, that those findings, all warranted, were not reflected in the sentence.

The trial court held, "kepentingan awam adalah faktor utama yang perlu dipertimbangkan dalam menjatuhkan hukuman dan untuk membendung kesalahan-kesalahan serius yang prevalent." Of course, the trial court could have looked at the sentences that had been imposed in the past for similar offences to determine the appropriate sentence (see *Marcial bin Aliudin v. PP Mallal's ibid* para 766).

In *PP v. Ng Ah Tak* [1959] 25 MLJ 19, Good J observed.

> Of all the offence against the person, with the exception of murder, I should think that causing hurt by acid-throwing is the worst; and people who indulge in it are savages who deserve no mercy as they have shown no mercy to the people they have attacked. It is absolutely no mitigation in a case of this kind to say that it is a first offence. In my view, the severest penalty is called for in all cases of acid-throwing. It is not a mitigating circumstance that no permanent injury or disfigurement was caused. When acid is thrown at a person, if they are not blinded and permanently disfigured, it is pure good luck. The intention of the thrower is the same whether the victim is permanently injured or not; and the act shows a callous disregard of the consequences. It would be very difficult to have any kind of provocation which would be a mitigating circumstance on a charge of acid-throwing.

In the result, Good J set aside the sentence, a fine of $400 fine, and substituted for it the maximum term of imprisonment of three years and six strokes of the cane, under s. 324 of the Penal Code, the section under which Ng was charged.

Yet in this case, where the respondent was convicted of an infinitely more serious offence, under s. 326 of the Penal Code which carries a term of imprisonment which may extend to 20 years, the trial court only saw it fit to impose a term of imprisonment of three years. With respect, that fraction of the maximum term of imprisonment shows a complete lack of understanding, on the part of the trial court, of the gravity of the crime. First, the offence was downplayed – it was only categorised as one of "excessive violence". Next, it was not appreciated that acid-throwing is not only a serious offence, but also a heinous and barbaric act as well. In point of fact, the respondent's criminal behaviour was shocking to the conscience. It was all so evident, that the aggravating circumstances and public interest demanded that a deterrent sentence should be passed for the offence of the nature in this case. Was it not the trial court who solemnly intoned, "Kepentingan awam adalah faktor utama yang perlu dipertimbangkan dalam menjatuhkan hukuman dan untuk membendung kesalahan-kesalahan serius yang prevalent."

Unfortunately, what played upon the trial court, as if there was this bee in its bonnet, were the personal circumstances of the respondent. The trial court listed three factors – (i) the respondent's clean record and that the respondent was not a common criminal, (ii) that the offence originated from a "family crisis", and, (iii) that the respondent's advanced age and his probable loss of his family – that could not, according to the trial court, be ignored. The trial court then opined, "dalam usia tertudoh yang tua dan prospek kehilangan keluarganya pada peringkat hidup ini, saya rasa tempoh

pemenjaraan yang panjang adalah tidak sesuai". But what about the fact that the offence was so wicked that any sentence passed must not only punish but also deter others? Also, what about the circumstances in which the offence was committed, and the degree of deliberation shown by the respondent? Was it not the intention of the respondent to horribly disfigure the victim and so condemn her to living hell? What about the fact that the respondent had not saved any judicial time? What about the fact that there was not a word of remorse or contrition (there was none in this court) from the respondent?

With respect, there was clear omission to strike a balance between the interest of the public and the interest of the respondent. There were just too much emphasis and too much weight given to the personal circumstances of the respondent. "A court has the discretion to be lenient and merciful provided there are extenuating circumstances **and it is in the public interest to do so**" *(PP v. Khairuddin)*. But in the present case, even in the light of those so-called personal extenuating circumstances, it was not, certainly not, in the public interest to pass less than a deterrent sentence. Definitely public interest far outweighed all personal considerations. And a deterrent sentence would have been passed, if only the public interest had been translated in the sentence.

> ... the word 'deterrent' it means that a sentence, which is higher than that which would normally be proper for the offence concerned, is to be imposed on the defendant ... (*Yau Kong Kui v. PP* [1989] 1 CLJ 1020, 141 per Roberts CJ).

Describing the offence as one most savage, and pressing for the sentence to be enhanced, the learned deputy public prosecutor, Encik Yaacob Sam, said that public interest demands a term of imprisonment of 12 years. He added, "it is no mitigation that this is a first offence". Learned counsel for the respondent, Encik Ismail, responded that a term of imprisonment of 12 years would be excessive. "The respondent is 57, and it was a crime of passion. Three years' imprisonment, in the circumstances, is a proper sentence."

Other than *Ng Ah Tak*, two other authorities also concerned acid-throwing. In *Muhundan & Anor v. PP* (*Mallal's Digest ibid* para 2536), where the victim died from his injuries and where the appellants pleaded guilty, the 1st appellant was sentenced to a term of imprisonment of ten years and eight strokes of the cane and the 2nd appellant to a term of imprisonment of eight years and eight strokes of the cane, for conspiring with others to commit grievous hurt to the victim by the use of a corrosive substance (formic acid), an offence under s. 4 of the (Singapore) Corrosive and Explosive Substances and Offensive Weapons Act (Cap 65) which provided that an offender "shall be liable on conviction to imprisonment for life and shall also be punished with caning with not less than six strokes".

In *Sinniah Pillay v. PP* [1992] 1 CLJ 241, where the victim was splashed with formic acid and died ten days later due to "septicaemia due to inhalation of acid fumes", the appellant was sentenced to a term of imprisonment of ten years for abetting with others to commit grievous hurt, an offence under s. 109 read with s. 326 of the (Singapore) Penal Code which provided that an offender "shall be punished with imprisonment for life or with imprisonment for a term which may extend to ten years and shall also be liable to fine or to caning".

Beyond argument, lengthy sentences were imposed in both instances of acid-throwing. Admittedly, a life was lost, a factor that would have been taken into account in the sentences, in both cases. In *Sinniah Pillay's* case, the Singapore Court of Criminal Appeal also took into account the fact that the appellant had made the prosecution to prove the main ingredients of the offence. The appellant in that case was not young. He was 62 years old. But that won him no (misplaced) sympathy. The Singapore Court of Criminal Appeal per Chao Hick Tin J said:

> The offence was a heinous one. Throwing formic acid on a person is a particularly vicious and painful way to injure him.

About a year later, in *Muhundan*'s case, with regard to acid-throwing, the Singapore Court of Criminal Appeal echoed, "this is a particularly vicious attack". Quite obviously, there is universal agreement with the observation of Good J in *Ng Ah Tak.*

Admittedly, for offences identical to our s. 4 of the Corrosive and Explosive Substances and Offensive Weapons Act 1958 and s. 326 of the Penal Code, the law in Singapore provides for a term of imprisonment for life. It could be argued therefore, that those prison terms in *Muhundan* and *Sinniah Pillay* were that long only because an offender could be punished with imprisonment for life. That might have been so. But our s. 326 provides for a term of imprisonment which may extend to 20 long years. *Prima facie,* a term of imprisonment of three years, bearing in mind that the respondent was not entitled to any discount on account of any plea of guilt, was most charitable. But really, given the undoubted public interest, the heinous nature of the offence, the evil design of the respondent, the permanent disfigurement to the victim's face, the total absence of all remorse, the fact that the respondent had not saved any judicial time, when all things are considered, it could only be said that the sentence of three years imprisonment was manifestly inadequate. The sentence was manifestly wrong, for it was totally unsuitable to the proved facts and circumstances.

a The severest penalty is called for in all cases of acid-throwing. At the very least, the minimum sentence must be half the maximum penalty. The term of imprisonment of three years is therefore enhanced, for the reasons aforesaid, and the personal circumstances of the respondent have been factored, to ten years.

b

c

d

e

f

g

h

i